2013 IL App (1st) 113621-U

FIFTH DIVISION
December 27, 2013

No. 1-11-3621

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 21267
	)	
LA BONNETT,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 Held: Defendant's conviction and sentence for delivery of a controlled substance are affirmed over defendant's objections challenging the court's admission of two prior convictions for possession of controlled substance as impeachment evidence, the propriety of the State's closing and rebuttal arguments and the court's imposition of a three-year term of mandatory supervised release. Further, the fees and fines order is modified in accordance with this order.

¶ 2 Following a jury trial, defendant LA Bonnett was convicted of possession of less than one gram of a controlled substance.[1] The court sentenced him to six years of imprisonment and a three-year term of mandatory supervised release (MSR). On

[1] In the record, defendant is variously referred to as "LA," "L.A.," "L A" and "La" Bonnett. "LA" is the name defendant uses in his appellate briefs.

appeal, defendant contends that: (1) the trial court erred in admitting his prior convictions for possession of a controlled substance (PCS) as impeachment evidence; (2) he is entitled to a new trial because the State, during closing arguments, improperly argued that the testimony of the Chicago Police Department witnesses was more credible because of their status as law enforcement officers; (3) the court erred in the amount it imposed in the fines and fees order; and (4) the court erred in imposing a three-year MSR term. We affirm the judgment of the circuit court as modified.

¶ 3 Background

¶ 4 On November 20, 2010, defendant was charged with delivery of less than one gram of a controlled substance. Prior to trial, defendant moved *in limine* to bar the State from using his three prior felony convictions as impeachment evidence. During the hearing on the motion, the State argued that the prior convictions, two for PCS convictions in 2001 and 2008 and one aggravated DUI conviction in 2006, were relevant to assess "the defendant's credibility on the stand" and that "the probative value of those felony convictions outweigh[s] the prejudicial effect." Defendant responded that the two drug offenses were very similar to the charge at bar in that "[o]bviously[,] you have to possess drugs in order to sell them" and admission of those two convictions would, therefore, be "more prejudicial than probative." The court barred admission of the DUI conviction but allowed the two PCS convictions into evidence for impeachment purposes.

¶ 5 The case went to trial before a jury. At trial, Chicago police officer Mark Smith

testified that, on November, 20, 2010, he participated in an undercover narcotics operation in which he acted as the "buy" officer. He stated that he had participated in "over 500" undercover narcotics operations during his 17 years as a police officer. Smith testified that he was dressed in civilian clothing and driving a civilian car because he did not want to be identified as a police officer. He saw defendant in front of a convenience store at 5330 West Madison Street in Chicago. Smith parked his undercover vehicle, approached defendant on foot and asked him for "two blows," by which he meant two bags of white heroin. Defendant told Smith he only had one left and handed Smith a "Ziploc" bag with "suspect heroin in it." Smith tendered as payment a recorded $20 bill. Defendant instructed Smith to go into the store to make change. Smith went into the store, exchanged the $20 bill for two $10 bills and gave one of the bills to defendant.

¶ 6 Officer Smith testified he then returned to his car and "radioed to [his] fellow officers that it was a positive narcotics purchase along with a physical description of the subject that sold him the narcotics." After providing the description of defendant, Smith departed in his car but remained in the area. He testified that, after Chicago police officers Coleman and Hall detained defendant, he "rolled nearby" to get a "good view of the subject," confirmed by radio to the other officers that they had detained the person who sold him the narcotics and then drove off.

¶ 7 Chicago police officer Lafayette Triplett testified that, on November 20, 2010, he was driving a civilian car while working as a surveillance officer in an undercover

narcotics purchase investigation. At 5330 West Madison Street, he observed defendant "engaged in several narcotics hand-to-hand transactions." Triplett testified that he had been a police officer for eight years and, in his experience as a surveillance officer, had observed "hundreds" of hand-to-hand transactions. He stated that, after observing defendant's transactions, he informed Officer Smith of defendant's location and gave him a description of what defendant was wearing. Triplett remained in his car and observed Smith arrive at the location. He saw Smith approach defendant, engage in a "hand-to-hand transaction" and enter a convenience store. After a short time, Triplett saw Smith exit the store and engage in a "second hand-to-hand transaction" with defendant. Triplett testified he "could see Officer Smith tendering the defendant paper United States currency." He stated that, after receiving confirmation from Smith that Smith had engaged in a "positive" narcotics purchase from defendant, he "radioed enforcement officers" with defendant's description and location. The enforcement officers arrived to the scene and detained defendant.

¶ 8 Chicago police officer Ronald Coleman testified that, on November 20, 2010, he was serving as an enforcement officer in a narcotics investigation when he received radio confirmation that Officer Smith had made a narcotics purchase. After receiving the address and description of the person who sold Smith the drugs, Coleman went to 5330 West Madison Street, where he placed defendant under arrest. Following a custodial search of defendant, he found $19 on defendant’s person, including a $10 bill. Taking that bill and a second $10 bill obtained from Smith into a convenience store, he

gave the store clerk the two $10 bills in exchange for the recorded $20 bill.

¶ 9 The parties stipulated that a forensic chemist at the Illinois state police crime lab would testify that he received a clear plastic bag containing a powdery substance from the Chicago police department and his testing showed the bag contained 0.2 grams of heroin.

¶ 10 Defendant testified that he worked at the funeral home across the street from the location of his arrest, directing cars in the parking lot. He stated that, when he got to work on November 20, 2010, he went to the store across the street from the funeral home to buy a cup of coffee. The coffee was not ready, so he returned to the funeral home. Defendant testified he subsequently returned to the store but the coffee was still not ready. He stated that, after he left the store the second time, two police officers stopped him and told him not to run. At the officers' direction, he emptied the contents of his pockets onto the front of the police car and stood in front of the car while the officers stood by the trunk of the car for approximately 20 minutes, after which they came back and told him he was under arrest. Defendant testified that he was not selling drugs and did not hand a packet of drugs to Officer Smith.

¶ 11 At the conclusion of defendant's testimony, the State introduced certified copies of defendant’s 2001 and 2008 PCS convictions. Following closing arguments, the court instructed the jury that the evidence of prior convictions could be considered only as it might affect defendant's credibility as a witness and not as evidence of his guilt.

¶ 12 The jury found defendant guilty of delivery of a controlled substance. The court

sentenced him to six years imprisonment and a three-year MSR term and imposed fines and fees. The court denied defendant's posttrial motion for a new trial on November 9, 2011, and defendant filed a timely notice of appeal on November 15, 2011. He raises four arguments on appeal.

¶ 13 ANALYSIS

¶ 14 (1) Admission of Prior Convictions

¶ 15 Defendant first argues that we should reverse and remand because the trial court improperly admitted his two prior PCS convictions as impeachment evidence. He contends that the court erred by failing to conduct the full balancing analysis mandated by *People v. Montgomery,* 47 Ill. 2d 510 (1971) before allowing the evidence. The *Montgomery* holding has been codified in Illinois Rule of Evidence 609 (eff. Jan. 1, 2011).

¶ 16 In *Montgomery*, the court stated that "a prior conviction 'may' be shown to impeach credibility" but, "[w]hen the accused takes the stand on his own behalf[,] he should be subject to impeachment only by proof of past crimes which bear directly on testimonial deception." *Montgomery*, 47 Ill. 2d at 515-16. The court held that

> "Evidence of a witness' prior conviction is admissible to attack the witness' credibility where: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later;

> and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice." *People v. Mullins*, 242 Ill. 2d 1, 14 (2011) (citing *Montgomery*, 47 Ill. 2d at 516).

"This last factor requires a trial judge to conduct a balancing test, weighing the prior conviction's probative value against its potential prejudice." *Mullins*, 242 Ill. 2d at 14.

¶ 17 In performing the *Montgomery* balancing test,

> "the trial court should consider, *inter alia*, the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness' criminal record, and whether the crime was similar to the one charged. [Citation.] If the trial court determines that the prejudice substantially outweighs the probative value of admitting the evidence, then the evidence of the prior conviction must be excluded." *Mullins*, 242 Ill. 2d at 14-5 (citing *Montgomery*, 47 Ill. 2d at 518).

"The determination of whether a witness' prior conviction is admissible for purposes of impeachment is within the sound discretion of the trial court." *Mullins*, 242 Ill. 2d at 15.

¶ 18 Defendant contends that the trial court abused its discretion by failing to perform the *Montgomery* balancing test and, instead, admitting defendant's prior PCS convictions for purposes of impeachment despite the probative value of the evidence being outweighed by its prejudicial effect.[2] He asserts that the court "merely issued a conclusory statement that [his] prior drug convictions are probative without explaining

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[2] The first two prongs of the three-prong *Montgomery* test are not at issue here.

how it arrived to that conclusion, utterly ignoring any other factors." He also argues that, by allowing the State to impeach him with two prior convictions for an offense similar to that for which he was on trial, the court improperly caused the jurors to consider the prior convictions as evidence of his propensity "to commit drug crimes." Defendant asserts that allowing the State to introduce two separate PCS convictions "certainly increased the risk that those convictions would be received not as evidence of impeachment, but as a suggestion of a propensity to commit drug crimes."

¶ 19 The court did not abuse its discretion in admitting defendant's 2001 and 2008 PCS convictions for impeachment purposes. First, defendant's testimony at trial constituted his entire defense. Therefore, his credibility was "a central issue, and the prior convictions were crucial in measuring defendant's credibility." *People v. Atkinson*, 186 Ill. 2d 450, 455 (1999). A conviction for unlawful possession of a controlled substance is "the type of conviction which is probative of credibility and affords a basis for impeachment." *Mullins*, 242 Ill. 2d at 18. The prior convictions were similar to the crime with which defendant was charged in that all three offenses involved a controlled substance. However, although courts "should be cautious in admitting prior convictions for the same crime as the crime charged *** 'similarity alone does not mandate exclusion of the prior conviction.' " *Mullins*, 242 Ill. 2d at 16 (quoting *Atkinson* 186 Ill. 2d at 463 (allowing the admission of two prior convictions for burglary for purposes of impeachment during the defendant's burglary trial)).

¶ 20 Moreover, there is a vast difference between possessing a controlled substance

and being a dealer in that substance. Nothing in such possession would lead a jury to conclude that defendant had a propensity to deliver controlled substances. Further, the court gave the jury an instruction limiting the use of defendant's prior convictions to the effect on his credibility rather than as evidence of his guilt. The jury was, therefore, aware that the prior convictions were not to be considered as propensity evidence.

¶ 21 Second, the record shows that the trial court was aware of the *Montgomery* requirements and engaged in the requisite balancing test. The admissibility of the prior convictions was fully argued and, in ruling on the motion *in limine* to exclude the prior convictions, the court stated:

> "In applying the test *** to determine whether or not this is probative or prejudicial[,] in doing the balancing test, the Court finds that the '06 aggravated DUI is prejudicial. The Court will bar that. In regards to the '08 and the '01 [convictions for possession of a controlled substance], the court finds that those are not prejudicial. They are probative. I will allow the '08 and the '01."

¶ 22 The court heard argument regarding the balancing test and then, in stating its decision, specifically said that it had applied the balancing test. Indeed, the court's decision to bar introduction of the DUI conviction shows that it exercised its discretion and attempted to minimize the potential prejudice to defendant by allowing only the admission of two of the three prior convictions and by providing the jury with a limiting instruction. See *Mullins*, 242 Ill. 2d at 19.

¶ 23 As defendant points out, the court did not explain in detail how it arrived at its

conclusion that the probative value of the 2001 and 2008 PCS convictions outweighed their prejudicial value. However, this does not mean that the court failed to conduct a meaningful analysis and "merely issued a conclusory statement," as defendant asserts. The trial court is not required to specify and evaluate the factors used in the balancing test on the record as long as it actually applies the test. *People v. Washington,* 55 Ill. 2d 521, 523–24 (1973). "Although the trial court must weigh factors relating to the prejudice and probative value of evidence of a prior conviction in reaching its determination as to the admissibility of that evidence, the court is not required to make an express evaluation in open court of those factors." *People v. Watkins*, 206 Ill. App. 3d 228, 245 (1990). Instead, "[a]bsent an express indication that the trial court was unaware of its obligation to balance these factors [citation], a reviewing court will assume that the trial court gave the factors appropriate consideration." *People v. Watkins*, 206 Ill. App. 3d 228, 245 (1990) (citing *People v. Washington*, 55 Ill. 2d 521 (1973)). Here, the court clearly stated that it had applied the *Montgomery* balancing test and weighed the probative value of the prior convictions against their prejudicial effect. We assume, therefore, that the court gave the balancing factors appropriate consideration. Accordingly, the trial court did not abuse its discretion in admitting defendant's 2001 and 2008 convictions for possession of a controlled substance for impeachment purposes.

¶ 24 (2) Closing Argument

¶ 25 Defendant next contends that he is entitled to a new trial because the State

made improper and prejudicial remarks during closing arguments by arguing that the testimony of the Chicago Police Department witnesses was more credible by virtue of their status as law enforcement officers.

¶ 26 In making a closing argument, the State is given a great deal of latitude. *People v. Pasch,* 152 Ill. 2d 133, 184 (1992). It may "comment on the evidence and any fair reasonable inferences it yields." *People v. Nicholas,* 218 Ill. 2d 104, 121 (2005)). It may "challenge a defendant's credibility or the credibility of his theory of defense when evidence exists to support the challenge." *People v. Glasper,* 234 Ill. 2d 173, 207 (2009). However, the State may comment on a witness's credibility in closing "only if the remarks are fair inferences from the evidence." *People v. Barraza,* 303 Ill. App. 3d 794, 797 (1999). " '[A] prosecutor may not argue that a witness is more credible because of his status as a police officer.' " *People v. Adams,* 2012 IL 111168403, ¶ 20 (quoting *People v. Clark*, 186 Ill. App. 3d 109, 115-16 (1989)).

¶ 27 "A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context." *Glasper,* 234 Ill. 2d at 204. "Statements will not be held improper if they were provoked or invited by the defense counsel's argument." *Glasper,* 234 Ill. 2d at 204. "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *People v. Wheeler,* 226 Ill. 2d 92, 123 (2007). We will reverse based on improper comments during closing arguments only if the defendant identifies remarks of the prosecutor that were (1) improper and (2) so prejudicial that the

defendant was denied real justice or the jury's verdict could have resulted from the error. *People v. Evans*, 209 Ill. 2d 194, 225 (2004).

¶ 28 There is an apparent conflict between two Illinois Supreme Court cases regarding the proper standard of review when reviewing improper remarks made during closing arguments. *People v. Raymond,* 404 Ill. App. 3d 1028, 1059–60 (2010) (citing *People v. Wheeler,* 226 Ill. 2d 92, 121 (2007) (applying *de novo* standard of review) and *People v. Blue,* 189 Ill. 2d 99, 128 (2000) (applying abuse of discretion standard of review)). However, as the State points out, we need not determine the proper standard of review here because, as shown below, the result would be the same under either standard. See *Raymond,* 404 Ill. App. 3d at 1060.

¶ 29 Defendant contends that he was prejudiced and denied a fair trial by six comments the State made in its closing and rebuttal arguments. He concedes that he failed to properly preserve four of the comments for review by failing to object at trial and/or include them in his post-trial motion. He urges our review of these comments under the doctrine of plain error, asserting the evidence in the case was closely balanced. See *People v. Enoch,* 122 Ill. 2d 176, 186 (1988). In addressing defendant's plain-error argument, we must first consider whether error occurred at all, which entails a substantive look at the issue raised. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008). Accordingly, we must determine whether, as defendant claims, the State's comments were improper attempts to persuade the jury to believe the officers' testimony by repeated reference to the fact that they are police officers. Read in context with the

entire record, especially the opening statements and the entirety of the closing argument, we find the comments were not improper.

¶ 30 Defendant first asserts the State laid the groundwork for its inappropriate argument in its initial closing argument in which it referred to the police witnesses's participation in a CPD narcotics task force and told the jury that the testifying police officers were part of "Unit 189, a task force created by the Chicago Police Department to target narcotics activity, not to target random men who are doing their job on a Friday morning." There is no error in this comment. First, the comment is supported by the evidence, by testimony that the officers were part of a narcotics task force intended to prevent drug trafficking. Indeed, in defendant's opening statement, he stated that the officers were members of a narcotics team.

¶ 31 Second, the State's comment was a direct challenge to defendant's theory of the case, which defense counsel had presented to the jury in her opening statement. Counsel told the jury in her opening statement that defendant was an innocent man. She told the jury that the officers were members of a narcotics team with access to a number of tools to do their job correctly but that the jury would hear that none of those tools were used in this case, "no video, *** no audio *** no fingerprints." She then stated "[t]he officers come up with the story, but they can't corroborate that story with any hard evidence."

¶ 32 Defense counsel then told the jury that defendant would take an oath on the stand and tell them the truth about what happened on the day of his arrest . She said

"[t]he only true thing we know that happened that day is that [defendant] is going to tell you about is that he was going to work that day, and the police officer stopped him and he had no drugs on him." Counsel was clearly inferring that the officers had no basis to arrest defendant, an innocent man on his way to work, and that they had lied about the circumstances of his arrest. The State's comment properly challenged the credibility of this theory of defense by stating that the testifying officers would not randomly target someone without cause.

¶ 33 Defendant claims the State again improperly invoked the office of its police witnesses in its initial closing argument in "an even clearer reference to credibility" when it told the jury:

> "That's why we have a courtroom and that's why witnesses come to the stand, so you can hear from them. So you can sit there and judge credibility, you can sit here and determine whether they have bias, interest or motive to lie. What motive, bias or interest do the officers you heard from today have to plant a case on this man?"

There is no error here. The State's remark is again directed to defendant's inference that the testifying officers had no basis to arrest defendant and lied on the stand. Granted, the State referred to the witnesses as "officers," but so did the defendant. The fact is that the State's witnesses were all police officers. They were only involved in the case because they were the investigating and arresting officers and testified only because of that involvement. It would be impossible to explain their testimony and the

case against defendant without some reference to the fact that these witnesses were police officers. There is nothing in this remark that improperly ties the witnesses's credibility to the fact that they are police officers. The above remark may also be considered to be an appropriate response to defense counsel's opening statement in which she highlighted the fact that defendant would take an oath and tell the jury the truth. The State's argument here reasonablely responds to defense counsel's opening by inviting the jury to similarly evaluate the police officers' oath and lack of bias, interest or motive to lie.

¶ 34 Defendant then asserts that the State went "even further in its rebuttal argument, repeatedly exhorting the jury to credit the testimony of the CPD witnesses because they are police officers, who would not lie to 'pin' a case on [defendant], and who should be trusted because 'they risk their lives' to do the work of fighting crime." He points to the following remarks by the State to the jury:

1. "These officers are going to come here, take that oath, and pin it on this guy? Him? Really? He must be the unluckiest man in the world."

2. "It certainly isn't some orchestrated, you know, TV movie of the week reason for .2 grams of heroin delivered on some random November day. That's what's going to happen? No. This isn't a TV movie. This is real life. These guys are real life narcotics officers, undercover officers that risk their necks to do these buys."

3. "What motive, interest or bias to hitch him for .2 grams in an undercover

buy? Have surveillance officers say he had all this kind of money. Are you kidding me? With all that's out there on the street, that's the end result. No way. No way."

4. "With respect to Officer Smith, I want you to consider too who he is. Who goes and makes undercover buys? Who? When you think about it, who? Use your common sense. Who in -- His demeanor while testifying. Who makes undercover buys?

* * *

Just consider that. Just consider what police officers have to do, who they are, who they have to be *** when they make undercover buys."

¶ 35 Whether read individually or as a whole, these comments are not improper attempts by the State to bolster its witnesses' credibility by repeatedly referring to the fact that they are police officers. Instead, they are appropriate challenges to defendants' theory of the case, supported by the evidence and, in most instances, were invited by defendant's closing argument.

¶ 36 Defense counsel started her argument by attacking the officers' veracity. She argued "here's what really doesn't make sense" and pointed out the officers' testimony that they had observed defendant engage in four transactions before Officer Smith's transaction but only found $19 on defendant, $10 of which was from Smith's transaction. Counsel asserted that, based on the officers' testimony that each bag of heroin was worth $10 and lack of testimony that defendant was seen to hand off money

to anyone else, there was $40 unaccounted for from the previous transactions.

¶ 37 Defense counsel had told the jury in her opening statement that, although the officers had access to video and audio recording tools, they had not used them. In her closing argument, she again raised the lack of video and audio evidence corroborating the officers' testimony. She remarked to the jury, although neither video nor audio was required to find someone guilty, "[d]o you have proof beyond a reasonable doubt? *** can you be sure beyond a reasonable doubt that it was [defendant] that did this? Can you be sure a mistake has not been made?" Counsel argued "[o]fficers are human like everyone else. And like everyone else, mistakes can sometimes happen. So that's why we have trials."

¶ 38 Defense counsel then pointed out assorted discrepancies between the officers' testimony, referring to one as a "direct contradiction of the exact same thing. A mistake." She argued that the discrepancies in testimony "don't add up. Does that mean [defendant] is not guilty? No. It means mistakes happen. It means that there's differences that people remember. It means we have to be sure about what really happened here." Counsel continued:

> "The issue in this case [is] are we sure beyond a reasonable doubt that it was [defendant] that delivered the drugs or was this a mistake made and he was picked up.
>
> * * *
>
> And just consider the fact that Officer Smith as he testified is trying not to

> be seen as a police officer. Yet an identification procedure is conducted whereby the suspect is put outside the car as Officer Smith drives by to look at him. And Officer Smith told us that he looked directly in this person's face and made the identification.
>
> I would argue that [it] is very unlikely that they would make them go face to face because then definitely the person you arrested would know that that officer is in fact an officer.
>
> * * *
>
> A mistake was made in this case, ladies and gentleman. [Defendant] may not be the most eloquent, the most educated, the most detailed in his answers, but that doesn't mean he committed this crime."

¶ 39 Defendant's closing argument appears to be that the officers made a "mistake" in arresting defendant. But, reading his counsel's closing argument as a whole with her opening statement, it is clear that defendant wants the jury to believe that the officers' "mistake" was not innocent. Counsel clearly inferred that the officers lied on the stand, at least with regard to the identification procedure. She inferred that defendant's testimony under oath is the only testimony that the jury should believe and, as the State put it colloquially in its rebuttal, that the officers were trying to "pin" a crime on defendant.

¶ 40 While defendant attempts to define the issue here as "mistake" versus "frame," the issue is not that clear cut. A mistake is obviously less likely when two separate

police officers identify the same defendant. The inference there is that the officers have colluded to either frame the defendant or at least persist in their identification of him even though they made a mistake. Lastly, even if defendant's entire defense was "mistake," the State's argument that the police officers have no motive in their busy lives to frame defendant, while not directly responsive to a mistake defense, does not rise to the level of error as it is always permissible to argue lack of motive, interest or bias.

¶ 41 All four rebuttal remarks were directed to challenging this defense theory. The State asks the jury why the officers would lie under oath, why they would make up a case against defendant for a relatively minor offense, why they would "risk their necks" for a .2 gram heroin transaction. Read in context, the State argued:

> "It's not the officer's fault that [defendant] only had one blow to give him. The officer didn't plan on going there to make change. That's just the way it worked out. That makes it all truthful. That makes it all believable. That makes it all credible that these officers did what they were supposed to do.
>
> It isn't just the testimony of one officer. *It certainly isn't some orchestrated, you know, TV movie of the week reason for .2 grams of heroin delivered on some random November day. That's what's going to happen? No. This isn't a TV movie. This is real life. These guys are real life narcotics officers, undercover officers that risk their necks to do these buys.*
>
> It certainly doesn't mean he is not guilty. Certainly I agree with the

> Defense there. But ladies and gentlemen, certainly you must consider his testimony in light of all the testimony in the case and the consistencies that the police officers presented.
>
> Remember the defendant is presumed innocent. He is not presumed truthful. That is not an instruction you will receive in this case. And you certainly have to judge the testimony of the defendant in the same manner as you judge the testimony of any other witness." (Challenged remark is italicized.)

All of this argument is directed to challenging defendant's theory that the State's witnesses lied on the stand and it does not unnecessarily focus on the fact that those witnesses are police officers and are, therefore, more credible.

¶ 42 With regard to the State's argument regarding Officer Smith, this remark was a direct challenge to defendant's argument that, if Officer Smith was "trying not to be seen as a police officer," it was "very unlikely that they would make [him] go face to face [to identify defendant while driving by in his car] because then definitely the person you arrested would know that that officer is in fact an officer." The State argued in response, in context, as follows:

> "*With respect to Officer Smith, I want you to consider too who he is. Who goes and makes undercover buys? Who? When you think about it, who? Use your common sense. Who in -- His demeanor while testifying. Who makes undercover buys?*
>
> [Defense objection overruled.]

> *Just consider that. Just consider what police officers have to do, who they are, who they have to be*
>
> [Defense objection overruled.]
>
> *when they make undercover buys.* Consider that. Consider that does that mean anything to Officer Smith if he is not the most eloquent guy in the world that he is not telling you the truth? Absolutely not. Absolutely not. What Officer Smith says is backed up, corroborated by what Triplett has to say and what Officer Coleman has to say." (Challenged remark is italicized.)

Defendant's inference was that Officer Smith and the other officers lied about Smith's drive-by identification of defendant and the State argued in response that Smith did not lie. The State did not unnecessarily belabor the fact that Smith, Triplett and Coleman were police officers or remotely suggest that these witnesses were more credible because they are police officers. Additionally, rather than being an argument that a police officer's testimony deserves more credibility, this argument can reasonably be interpreted as asserting that Smith's, as well as Triplett's, vast experience and training would make it less likely that they would make a mistake in identifying defendant.

¶ 43 In sum, we do not find that, as defendant asserts, the State improperly attempted to persuade the jury that the State's witnesses were more credible by referring to the fact that they are police officers. The report of proceedings shows that the challenged comments by the State were based on the evidence, made in direct response to defendant's theory of the case and invited by defendant's attempts to discredit the

officers' testimony. Taken as a whole, the State's comments did not improperly focus on the witnesses's status as police officers in order to boost the witnesses's credibility and there is no pattern of prosecutorial misconduct requiring a new trial.

¶ 44 (3) Fines and Fees

¶ 45 Defendant argues, and the State concedes, that the court erred in assessing a $200 DNA analysis fee and in failing to credit him with $5 for each day he served in presentence custody.[3] Given that defendant is already registered in the DNA database, he is not required to resubmit a DNA sample and cannot be assessed the DNA analysis fee again. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Therefore, we vacate the DNA analysis fee.

¶ 46 Given that defendant spent 354 days in jail on a bailable offense prior to his sentencing, he is entitled to a $5 credit for each day of that incarceration against creditable fines (725 ILCS 5/110–14 (West 2010)), for a total credit of $1,770. The parties agree that the $5 drug court assessment, $30 children's advocacy center assessment and $1,000 controlled substance fines are subject to offset. See *People v. Folks*, 406 Ill. App. 3d 300, 305-07 (2010); *People v. Jones*, 223 Ill. 2d 569, 592 (2006). Accordingly, defendant is entitled to an offset of $1,035 toward these fines.

¶ 47 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), and our authority to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we order that the fines and fees order be corrected to reflect (1) vacation of the

[3] Upon sentencing, the court had imposed fines and fees on defendant totaling $1,765.00.

$200 DNA fee, (2) $1,770 in presentence custody credit and (3) offset of the $5 Drug Court assessment, $30 Child Advocacy Center assessment and $1,000 controlled substance fine in their entirety, for a corrected total amount of $530.

¶ 48 (4) Mandatory Supervised Release Term

¶ 49 Defendant's last argument is that the court erred in sentencing him to a three-year MSR term. Defendant was convicted of delivery of less than one gram of a controlled substance, a Class 2 felony. 720 ILCS 570/401(d)(I) (West 2010). However, as a result of prior Class 2 felony convictions, he was required to be sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2010). The MSR term is three years for a Class X felony (730 ILCS 5/5-8-1(d)(1) (West 2010)) and two years for a Class 2 felony (730 ILCS 5/5-8-1(d)(2) (West 2010)).

¶ 50 Defendant argues that the court erred in imposing the three-year MSR term applicable to Class X offenders. He asserts that, since he was convicted of a Class 2 felony and sentenced as a Class X offender only because of his prior criminal history, the proper MSR term was the two-year term applicable to Class 2 offenses. He argues that the classification of the conviction, not the sentence, is the guide for determining the length of MSR an offender must serve. We have repeatedly rejected this argument, most recently in *People v. Lenoir*, 2013 IL App (1st) 113615, ¶¶ 22-25.

¶ 51 Defendant acknowledges that three districts of the appellate court have rejected the same argument he raises here, citing *People v. Lampley*, 405 Ill. App. 3d 1 (1st Dist. 2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1068–73 (4th Dist. 2010); and *People*

v. McKinney, 399 Ill. App. 3d 77, 79–83 (2d Dist. 2010). However, as did the defendant in *Lenoir*, he argues that these decisions should not be followed as they were wrongly decided and our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), dictates a different result.[4] To restate our decision in *Lenoir*, we disagree.

> "In *Pullen*, the court considered the issue of the maximum aggregate length of consecutive sentences a court could impose under section 5–8–4(c)(2) of the Unified Code (730 ILCS 5/5–8–4(c)(2) (West 1994)). The *Pullen* issue differs from the issue presented here. We therefore find no reason to depart from our earlier decisions in *Lampley*, *Lee*, *McKinney* *** and find that the three-year term of MSR imposed on defendant as a Class X offender was proper." *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 21-24

¶ 52 Conclusion

¶ 53 For the reasons stated above, we order that the fines and fees order be corrected. We affirm on the remaining issues raised in this appeal.

¶ 54 Affirmed; fines and fees order corrected.

[4] In *Lenoir*, as here, the defendant was convicted of a Class 2 felony and sentenced to a three-year MSR term as a Class X offender as a result of his prior criminal convictions. *Lenoir*, 2013 IL App (1st) 113615.